

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 956 of 1996****For Approval and Signature:****HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

=====

1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
?

=====

STATE OF GUJARAT - Appellant**Versus****DHANESHBHAI RAICHANDJI SHAH - Respondent**

=====

Appearance :

MR. M.A. PATEL, LD. APP for Appellant:

MR JB PARDIWALA for Respondent :

=====

CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**Date : 06/12/2006****ORAL JUDGMENT**

Heard learned counsels for the parties.

1. The appellant State of Gujarat has preferred this appeal under section 378 of the Code of Criminal Procedure, 1973 (herein after referred to as the 'Code') challenging the order of acquittal dated 31/5/1996 passed by learned JMFC Pardi in Criminal Case No. 2134 of 1992 acquitting the respondent / original accused of the charge of commission of offence under section 498-A, 323, 504, 506(2) of Indian Penal Code. This Court (Coram: A.N. Divecha, J) granted leave and admitted the appeal which was ordered to be expedited vide order dated 7/11/1996.

2. The facts leading to preferring of this appeal deserve to be set out in brief as under:

It was the case of the prosecution that on 10/12/1991 the prosecution witness No.1 lodged complaint before Vapi Town Police Station against the accused/ respondent that when she prevented her husband/accused from removing video, he got enraged and started abusing her and had beaten her with cricket bat. On her shouting their servants Kamuben and Kishen had rushed there and few other people had also gathered. The accused husband had left the house as people had gathered there. On account of beating the complainant sustained injury on left wrist and arm. She also sustained injury on head and backside and injury on hip and thigh of

left leg. Her in-laws had taken her to hospital for treatment. The complaint appears to have been registered and recorded at the hospital. The investigation was carried out. After gathering sufficient evidences police charge sheet came to be filed before the competent court. The accused was summoned. He was given charge at exhibit-3, his plea came to be recorded at exhibit-4, and he came to be tried. The prosecution evidence was recorded and further statement of the accused was also recorded under section 313 of the Code, wherein accused denied the case of the prosecution. The trial court has acquitted the accused on account of prosecution's failure in proving its case beyond doubt so as to bring home guilt of the accused for the offence punishable under section 498-A, 323, 504, 506 (2) of I.P. Code. The said order of acquittal dated 31/5/1996 passed in Criminal Case No. 2134 of 1992 is impugned in the present appeal preferred under Section 378 of the Code by the appellant State.

3. Learned counsel Shri. Pardiwala appearing for the respondent has submitted that the complainant and the accused had long married life of about seventeen years. The respondent/accused had preferred divorce petition No. 22 of 1991 before the competent court which was pending at the relevant time of commission of alleged offence. The

respondent/accused had to prefer proceedings before this Court being Civil Revision Application No. 195 of 2003 in respect of the order dated 8/4/2003 passed by learned Civil Judge (S.D.) at Valsad under section 24 of the Hindu Marriage Act 1955 in respect of interim maintenance. In the proceedings of said Civil Revision Application No. 195 of 2003 respondent husband and complainant wife filed compromise and said compromise was duly signed by both of them on 17/7/2003. As per the terms of compromise, both the parties agreed that their marriage be dissolved by decree of divorce under Section 13-B of the Hindu Marriage Act, 1955. The question of permanent alimony was also settled. The husband agreed to pay a sum of Rs.7,00,000=00 towards full and final settlement of the claim of the wife and children towards their maintenance and future requirement. Respondent accused was to deposit Rs.2,0000=00 in the Registry of this Court on or before 31/7/2003 and balance amount of Rs.5,00,000=00 was to be deposited in the Registry of this Court before 31/10/2003. The respondent husband had further agreed that Flat No. 6/1 with garage of Amardeep Apartment, Godalnagar, Vapi belonging to the husband / respondent which was in possession of complainant wife would be given to her for her exclusive ownership for residence of herself and their children, and there was an agreement that the criminal complaints would be

withdrawn and or request would be made for passing appropriate orders in pending matters. This Court (Coram: K.M. Mehta, J) passed an order on 6/2/2004 in said Civil Revision Application No. 195 of 2003 permitting the wife to reside in the said flat and to withdraw the amount as per terms of the compromise. The letter addressed by wife / respondent therein to Legal Secretary, Legal Department, State of Gujarat is also taken on record for requesting withdrawal of present Criminal Appeal No. 956 of 1996 arising out of Criminal Case No. 293 of 1992. Shri. Pardiwala has brought on record the terms of compromise entered between the parties on 17/7/2003. The order of this Court (Coram: K.M. Mehta, J) in Civil No. 195 of 2003 and the letter addressed by complainant wife to the Legal department along with certificate of posting dated 20/2/2004 on record of this appeal.

4. Learned APP Shri. Patel for the State has submitted that he has made appropriate inquiry through Deputy Secretary Mr. Joshi of Legal Department, attached to the High Court, in respect as to what is the stand of the State in view of the letter of the complainant witness posted on 20/2/2004. Shri. Patel submits that he has received no instruction so far in this behalf.

5. Against this backdrop, this Court is required to examine the impugned order of acquittal in this appeal under section 378 of Cr.P.C. The testimony of prosecution witness No.1 wife go to show that the incident of beating had occurred on 10/12/1991. The accused respondent was trying to takeaway "Video" (it appears to be VCR), however the same is referred to by the witness as 'video'. When she tried to prevent him from removing video, accused had inflicted injuries and abused her and threatened with dire consequences of killing. She has admitted in her testimony that before the incident they had a marriage life of 17 years. She has admitted in her testimony further that the complainant did not make any further statement or representation to the police. In her cross examination she has stated that the flat wherein the incident had occurred was situated in a busy locality and there are residential premises around the flat. She has admitted that during the incident the residents of Amardeep Apartment and other people had gathered. She has admitted that around 25 to 30 persons had gathered and they had witnessed the incident. She has given name of 10/12 persons who had witnessed the incident. She has stated that, first she had gone to hospital and taken treatment and thereafter she had gone for lodging complaint before police station. She has stated that she had to stay in the hospital for two days and third day she was discharged. She

did not remember on which date she was discharged from hospital. She has stated that she had gone to police station at around 3 to 4 p.m. for registering complaint and thereafter she had returned to hospital. She was advised to lodge complaint by the doctor. She states that when she had gone to police station she was in a condition to go to police station and speak properly. She has stated that she has not been required to sign any document. She has stated that on 11/12/1991 police had come to the hospital for making inquiries. She has stated, on that day they had taken her signature in the hospital. She has also admitted that the complaint at exhibit-7 is the same complaint which was registered and was taken down in the hospital on 11/12/1991. She has admitted that in her complaint she has not mentioned name of the persons who had witnessed the incident. She has admitted that on the day of incident in the residence the servant and his wife, children, and accused were present. She has admitted that timing of school of children were 8 am to 1.30 p.m. but she denied the suggestion that on 10/12/1991 they were in the school and she had stated on her own that on the date of incident they had remain home for some reason but she could not state the reasons for which the children had to remain home. She has denied the suggestion that exhibit-7 complaint was registered on 10/12/1991. She has admitted that

before the incident of offence they had married life of about 14 years. She had also admitted that the accused respondent had filed Hindu Marriage Petition No. 22 of 1991 before the competent court which was pending at that time. She has also admitted that before filing the marriage petition, notice was served upon her. She has pleaded ignorance to the suggestion that the marriage petition was filed earlier than the date of complaint. She has denied the suggestion that she was separated from the respondent since 1988 but she has stated on her own that she has been residing separately from the date of incident. She has also admitted that she had applied for maintenance from the husband in the court. She has stated that servants have left 1 ½ years ago. She has admitted that when on 11/12/1991 the police inquired her mother in law was present in the hospital. She has stated that she did not remember as to whether her mother in law was questioned or not. She has stated that on 10/12/1991 she had gone to police station and informed police about the incident and thereafter on 11/12/1991 police had come to hospital. Thereafter police had never made inquiry about the incident nor have they taken statement of her. She has admitted that her children statements were recorded. She has admitted that after her discharge from hospital police had never visited the place for making inquiry. She has denied the suggestion that Vapi

town Sr. PSI on 13/12/1991 recorded here statement.

6. PW-2 - Kamuben was working as servant has not supported the case of the prosecution and she has been declared hostile. Similarly her husband Kishen working as servant in the house of the complaint has also not supported the case of the prosecution and he was also declared hostile. The children however have supported case of the prosecution. The children have also stated names of the eye witnesses of the incident in the testimony. The elder brother of the accused had also given testimony in favour of the prosecution, though he is not an eye witness. In his cross examination contradictions have been brought out with regard to his statement made before the police.

7. The trial court has acquitted the present respondent accused for prosecution's failure in establishing its case beyond doubt. The trial court has not found the complainant to be truthful. Complainant's version that she had registered complaint on 11/12/1991 and the version of investigating officer that the complaint was lodged only on 10/12/1991 has been treated as serious blow to the case of the prosecution. The treating doctor of the complainant however in unequivocal terms stated that she had been admitted on 10/12/1991 and

had remained in hospital, and was discharged only after two days. Thus this testimony of the doctor who had treated complainant goes to show that version of the complainant can not be said to be absolutely correct and believable. The version of complainant's elder brother who had not witnessed the offence also deserve to be viewed with great care and caution as he himself had to file complaint against the accused on earlier occasion. Though it was in respect of ill treatment on the part of the accused witness in respect of keeping his child. It is also deserves to be noted that though there were independent witnesses who have been cited by the complainant in her testimony not a single witness has been examined by the prosecution. The testimony of child witnesses though supports case of the prosecution, also deserve to be viewed in light of the fact that the matrimonial dispute was going on and there were cases in respect of dissolution. All these factors go to show that the incident of inflicting injury appears to have taken place. However this entire incidence deserved to be viewed in the background of development of the circumstances between the complainant PW-1 and the accused respondent in the interest of justice. Shri. Pardiwala has relied upon decision of this Court in case of CHIMANLAL J. GANDHI, L.R. OF NATVARLAL JESINGBHAI SHAH (DECD) V. ANILBHAI R BAKERI & ORS, reported in 1997 (2)GLR pg. 1179,

in support of his submission that when the complainant herself has requested the State of Gujarat for withdrawing the appeal because there is amicable settlement between the parties, and the settlement has been absolutely genuine and bonafide and it is approved by this Court in revision proceeding being Civil Revision Application No. 195 of 2003. Shri. Pardiwala has also relied upon a decision of this Court in case of NARESHKUMAR AMRUTLAL RAVAL V. STATE OF GUJARAT, reported in 2006(2) GLR, pg. 1186 and urged that in view of the genuine amicable settlement arrived at between the parties without any coercion from any side, this Court in acquittal appeal may not disturb the order of acquittal. Otherwise reversing order would result into tremendous hardship to the respondent and could have an effect upon his entire life. Shri. Pardiwala has also relied upon decision of Apex Court in case of B.S. JOSHI AND OTHERS Vs. STATE OF HARYANA AND ANOTHER, reported in (2003) 4 SCC pg. 675 in support of his plea of not disturbing decision of the trial court considering the peculiar facts & circumstances of the present case. The decision of this Court in case of Chimanlal J. Gandhi (supra) is ofcourse in respect of a private complaint and it was not in respect of a case which had arisen out of police report. However the same can not be said to be not applicable to the facts & circumstances of the

present case as it is in respect of whether to reverse judgment of the trial court, whether any interference is required to be made with order of acquittal in the peculiar facts when parties have arrived at a settlement without any coercion before this Court in another proceedings wherein it is agreed that the present complainant would make an application to the State for withdrawing the appeal. The decision in case of Nareshkumar Amrutlal Raval (supra) and the decision in respect of B.S. Joshi (supra) in which, in view of the settlement of dispute between husband and wife after post conviction and as they were living together sentence was reduced to that have already undergone instead of six months simple imprisonment.

8. In the instant case also, though the husband and wife are not residing together but have separated and both of them are leading their respective life peacefully and the wife / original complainant has already made request vide her letter posted on 20/2/2004 for withdrawing the appeal the same deserves to be taken into consideration. Therefore, though this Court is not in complete agreement with the reasonings of the trial court for passing order of acquittal, is of the considered view that against the aforesaid backdrop the order of acquittal if reversed would rather result into

miscarriage of justice. In fact the injury appears to have been sustained by wife but it is a solitary incident and which has caused simple hurt punishable under section 323 which is a compoundable offence under section 320 of the Code can not be equated with cruelty as it is envisaged in section 498-A of I.P. Code. Even if assuming that the husband had inflicted injury in a sudden provocation same cannot be equated with the cruelty envisaged under section 498-A of I.P. Code so as to convict the respondent husband for commission of offence under section 498-A of I.P. Code. The essential ingredients of section 498-A can certainly not be said to have been established by the prosecution beyond doubt so as to bring home guilt on the part of the respondent and convict him for commission of offence under section 498-A of the Code, which ofcourse is not compoundable.

9. In view of the aforesaid discussions, this Court is of the considered view that the judgment & order of acquittal dated 31/5/1996 passed by learned JMFC, Pardi, in Criminal Case No. 2134 of 1992, impugned in the present appeal does not call for any interference and, therefore, the appeal requires to be dismissed and is dismissed accordingly.

[S.R. BRAHMBHATT, J]

/vgn